No. 90-1791

In The

Supreme Court Of The United States

October Term, 1991

THE CONNECTICUT NATIONAL BANK,

Petitioner,

v.

THOMAS M. GERMAIN, TRUSTEE FOR THE ESTATE OF O'SULLIVAN'S FUEL OIL CO., INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JOINT APPENDIX

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UNITED STATES COURT OF APPEALS FOR
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CASE NO. 90-8054

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UNITED STATES BANKRUPTCY COURT
DISTRICT OF CONNECTICUT

In The Matter Of:

O'SULLIVAN'S FUEL OIL CO., INC., Debtor — In Bankruptcy Case No. 2-84-00038

THOMAS M. GERMAIN, TRUSTEE FOR THE ESTATE OF O'SULLIVAN'S FUEL OIL CO., INC., Plaintiff

v.

CONNECTICUT NATIONAL BANK, Defendant — Adversary Proceeding No. 2-87-0078

ORDER

The defendant's motion to strike plaintiff's request for trial by jury having been heard, and the court having filed a Memorandum of Decision containing Conclusions of Law, it is hereby

ORDERED, ADJUDGED AND DECREED that the defendant's motion be denied.

Dated at Hartford, Connecticut, this 6th day of September, 1989.

/s/ ROBERT L. KRECHEVSKY
ROBERT L. KRECHEVSKY
CHIEF BANKRUPTCY JUDGE

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

O'SULLIVAN'S FUEL OIL CO., INC., :

– v. – : Civil No. H-89-663 (PCD)

THE CONNECTICUT NATIONAL BANK :

RULING ON MOTION FOR LEAVE TO APPEAL

On September 6, 1989, Judge Krechevsky, Chief Bankruptcy Judge, denied defendant's motion to strike the trustee's request for trial by jury in an adversary proceeding and, since both parties agreed that the bankruptcy court had no authority to conduct a jury trial, he directed the parties to take appropriate steps to remove the proceeding from the bankruptcy court. On September 15, 1989, defendant filed a notice of appeal, Bankruptcy Rule 8001(a), and a notice of appeal by leave, Rule 8001(b). Defendant contends that Judge Krechevsky's ruling is a final judgment within the meaning of 28 U.S.C. § 158(a) and that it is entitled to appeal as a right. Alternatively, defendant seeks leave to appeal from an interlocutory order.

DISCUSSION

A. Appeal as of Right

Defendant contends that the ruling in issue determined not only the jury trial issue but also the jurisdictional issue of whether or not the bankruptcy court can hear the matter. Thus, defendant asserts that the proceeding has terminated with respect to the bankruptcy court and the ruling should be construed as a final order for the purposes of appeal.

Section 158(a), 28 U.S.C., provides that the "district courts . . . shall have jurisdiction to hear appeals from final judgments, orders, and decrees . . . of bankruptcy judges." A final judgment is generally "'one which ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.'" *In re American Mariner Indus., Inc.*, 734 F.2d 426, 428 (9th Cir. 1984), quoting *Catlin v. United States*, 324 U.S. 229, 233 (1945). While the ruling in issue would not be final under the standards of finality applied in the typical civil case, it has been recognized that the finality requirement should be "less rigidly applied in bankruptcy than in ordinary civil litigation." *In re Johns-Manville Corp.*, 824 F.2d 176, 179 (2d Cir. 1987). This is due to the unique characteristics of bankruptcy cases which are frequently protracted proceedings involving numerous parties. *F/S Airlease II, Inc. v. Simon*, 844 F.2d 99, 104 (3d Cir. 1988). A decision in a bankruptcy case is considered final "when it wraps up a piece of litigation that would have been a stand-alone suit outside of bankruptcy law." *In re Kilgus*, 811 F.2d 1112, 1116 (7th Cir. 1987). Accordingly, courts have held that an order finally disposing of an adversary proceeding which is sufficiently discrete and separable from the rest of the bankruptcy is appealable as a final order despite the fact that the remainder of the bankruptcy proceeding remains pending. *See, e.g., In re Louisiana World Exposition, Inc.*, 832 F.2d 1391, 1396 (5th Cir. 1987) (each adversary proceeding should be considered a separate judicial unit for purposes of determining finality).

Defendant contends that were this not a bankruptcy case, Judge Krechevsky's decision that he lacked jurisdiction to hear the matter would have resulted in dismissal of the action. Thus, it argues that the decision should be considered final since there is nothing left for the bankruptcy court to do regarding this adversary proceeding. However, the adversary proceeding in issue has not been finally resolved. The ruling would not be considered a final judgment in a stand-alone dispute outside of the bankruptcy context. *See In re Xonics, Inc.*, 813 F.2d 127, 129 (7th Cir. 1987). The denial of defendant's motion to strike the trustee's request for a jury trial did not

purport to resolve the merits of the adversary proceeding in question, but merely determined the forum and factfinder. Judge Krechevsky's ruling only determined that the trustee has a right to a jury trial in an adversary proceeding to recover monetary damages for torts and contract violations allegedly committed by defendant post-petition. He ordered the parties to remove the action from the bankruptcy court based on their agreement that the bankruptcy court has no authority to conduct a jury trial. However, he did note that the issue was one "expressly left undecided" by *Granfinanciera v. Nordberg*, 492 U.S. ___ (1989). Although the ruling results in a change of forum, it does not represent a final order as to the resolution of the adversary proceeding. Accordingly, the denial of defendant's motion to strike the trustee's jury demand is found to be interlocutory in nature. *Cf. In re Stiles*, 29 Bankr. 389 (M.D. Tenn. 1982) (denial of a jury demand by a bankruptcy judge is a non-appealable interlocutory order).

B. Appeal by Leave of Court

An appeal from an interlocutory order may be taken to a district court under 28 U.S.C. § 158(a), but only "with leave of the court." Leave to appeal is liberally granted where it will further the expeditious resolution of the case. *See, e.g., In re Johns-Manville Corp.*, 45 Bankr. 833, 835 (S.D.N.Y. 1984). Leave to appeal interlocutory orders of the bankruptcy court are considered under the standard found in 28 U.S.C. § 1292(b), which deals with appeals of interlocutory orders from district courts to courts of appeals. *In re Beker Indus. Corp.*, 89 Bankr. 336 (S.D.N.Y. 1988). Under this standard, leave should be granted if there are controlling questions of law as to which there are substantial grounds for difference of opinion and if an immediate appeal may materially advance the ultimate termination of the litigation. *Id.*

The trustee does not dispute that the issue involves a controlling question of law on which there exists a substantial ground for difference of opinion but rather argues that defendant cannot establish that an immediate appeal will materially advance the ultimate termination of the litigation. He contends that the ruling related only to a procedural matter, did not affect the issues to be determined by the trier of fact, nor have a substantial impact on the length of the trial itself. Defendant, on the other hand, argues that a determination that the trustee lacks a right to a jury trial would bring the matter back before Judge Krechevsky for expeditious resolution. In short, defendant contends that a bench trial in the bankruptcy court would be considerably swifter than a jury trial in some other forum after the lengthy process of removal.

Considering all the circumstances of this case, leave to appeal will be granted. Although limited to the issue of the trustee's right to a jury trial, the ruling has the effect of removing the matter from the bankruptcy forum. In view of the substantial potential for delay in removing the case from the bankruptcy court to conduct a jury trial in an as yet undetermined forum, an immediate appeal "may materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b). Further, an expedited briefing schedule such as that provided in Bankruptcy Rule 8009(a) would not result in significant delay should Judge Krechevsky's ruling be upheld. Accordingly, defendant's motion for leave to appeal is granted. The parties shall brief the matter as provided in Rule 8009(a) with the time periods commencing as of the date of this order.

SO ORDERED.

Dated at Hartford, Connecticut, this 14th day of November, 1989.

/s/ Peter C. Dorsey
Peter C. Dorsey
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

THE CONNECTICUT NATIONAL BANK,	
Defendant-Petitioner	Petition for Permission to Appeal
V.	
THOMAS M. GERMAIN, TRUSTEE FOR THE ESTATE OF O'SULLIVAN'S FUEL OIL CO., INC.	
Plaintiff-Respondent	May 25, 1990

PETITION FOR PERMISSION TO APPEAL

Pursuant to 28 U.S.C. § 1292(b) and Rule 5(a) F.R.App.P., The Connecticut National Bank ("CNB") hereby petitions the Court for permission to appeal the March 22, 1990 order and ruling of the Hon. Peter C. Dorsey, U.S. District Judge of the District of Connecticut (a copy of which order and ruling is attached hereto as "Appendix A"), which order was amended by the district court on May 16, 1990 to add the statement prescribed by § 1292(b) (a copy of which amendment is attached hereto as "Appendix B").

JURISDICTION

The Court may review the March 22, 1990 order and ruling of the district court pursuant to 28 U.S.C. § 1292(b). *In re Johns-Manville Corp.*, 824 F.2d 176, 180 (2d Cir. 1987).[1]

[1] Alternatively, this Court has jurisdiction over this matter under the collateral order doctrine. *See* notes 4 & 15, *infra*.

STATEMENT OF FACTS

1. On January 18, 1984, O'Sullivan's Fuel Oil Co., Inc. (the "debtor"), filed a voluntary petition in bankruptcy under Chapter 11 of the Bankruptcy Code, 11 U.S.C. § 101 *et seq.* (hereinafter the "Bankruptcy Code").

2. CNB, a secured lender, filed a proof of claim in the case.

3. On July 30, 1986, the bankruptcy court ordered the conversion of the debtor's case from a Chapter 11 reorganization to a Chapter 7 liquidation.

4. Subsequent to the conversion, Thomas M. Germain, Esq. ("Trustee") was appointed Chapter 7 Trustee of the debtor's estate.

5. On May 29, 1987, the Trustee commenced suit against CNB in the Superior Court for the State of Connecticut alleging that, prior to and during the course of the bankruptcy proceedings, CNB committed various tortious acts against the debtor and the debtor's estate. The remaining counts of the Trustee's amended complaint allege (1) tortious interference; (2) coercion and duress; (3) fraudulent misrepresentation; (4) breach of an implied obligation to act in good faith and with fair dealing; and (5) violation of the Connecticut Unfair Trade Practices Act, Conn. Gen. Stat. § 42-110a *et seq.*[2]

6. On July 15, 1987, the action was removed to the bankruptcy court.

7. On August 24, 1987, the Trustee filed in the bankruptcy court a demand for a jury trial on all of the issues raised in the amended complaint.

8. On November 2, 1988, CNB moved in the bankruptcy court to strike the Trustee's jury demand.

[2] The Trustee's RICO claim was dismissed by the district court.

9. On September 6, 1989, the bankruptcy court denied CNB's motion to strike.

10. On November 14, 1989, the district court granted CNB's request for leave to appeal the bankruptcy court's refusal to strike the Trustee's jury demand.

11. On March 22, 1990, the district court affirmed the bankruptcy court's order denying CNB's motion to strike.

STATEMENT OF QUESTION PRESENTED

Is the Chapter 7 bankruptcy Trustee entitled to claim the right to a jury trial with regard to the bankruptcy estate's postpetition claims against a secured creditor who has filed a claim against the estate?

STATEMENT OF SUBSTANTIAL BASIS FOR DIFFERENCE OF OPINION ON THE CONTROLLING QUESTION OF LAW

Section 1292(b) requires that the order appealed from involve a controlling question of law over which there is a substantial basis for difference of opinion.

A. The District Court's Determination Involves a Controlling Question of Law.

In this case, the district court ruled as a matter of law that the Trustee was entitled to a jury trial. The issue is a controlling question of law for the purposes of § 1292(b) because it resolves a determination that may importantly affect the conduct of the action, namely whether the action will be tried to a jury or before the bench, in an as yet undetermined forum.[3] *See In re Duplan*, 591 F.2d 139, 148 n. 11 (2d Cir. 1978) (a controlling question of law may include "a procedural determination that may importantly affect the conduct of an action"). *See also Katz v. Carte Blanche Corp.*, 496 F.2d 747, 755 (3d Cir. 1974), *cert. denied*, 419 U.S. 885 (1974) (to be a controlling question, the order need not "be determinative of any plaintiff's claims on the merits"). The issue is also a controlling question of law for the reason that the district court's determination, if erroneous, is reversible error.[4] *See Id.*, 496 F.2d at 755 (the standard of what constitutes a controlling question of law must be broad enough to encompass "every order which, if erroneous, would be reversible error on final appeal"). Moreover, the question presented is a controlling question since resolution of the issue may substantially accelerate the disposition of the litigation. *See In re Duplan*, 591 F.2d at 148 (quoting 9 Moore, Federal Practice ¶ 110.22[2] at 260 (1975) (" '[t]he courts have tended to make the 'controlling question' requirement one with the requirement that its determination 'may materially advance the ultimate termination of the litigation' ").[5]

[3] The district court remanded the case to the bankruptcy judge to determine the propriety of conducting a jury trial in the bankruptcy court. Appendix A, p. 10.

[4] Alternatively, if Judge Dorsey's ruling is erroneous but would not warrant reversal upon entry of a final judgment, then this Court has jurisdiction to review the order at this time under the collateral order doctrine. *See* note 15, *infra*.

[5] The potential of an immediate appeal to accelerate the ultimate termination of the litigation is more fully discussed in the last section of this Petition.

B. The Controlling Question of Law is One Over Which There Exists a Substantial Ground for Difference of Opinion.

In addition, Judge Dorsey's order involves a question over which there is substantial ground for difference of opinion since compelling authority suggests that the district court erred in reaching its conclusion. *See McDonnell Douglas Finance v. Pennsylvania Power & Light Co.*, 849 F.2d 761, 765 (2d Cir. 1988) (court cited to contrary decision by a district court in another jurisdiction to establish substantial basis for difference of opinion). As numerous courts have candidly stated, the entire area of jury trials in bankruptcy is the subject of sharp disagreement.[6] However, in spite of this general lack of consensus, certain relevant principles necessary to resolve the issues in this case are not the subject of dispute. It is clear that, upon filing a petition in bankruptcy, all of the debtor's property becomes property of the bankruptcy estate, including any and all causes of action. 11 U.S.C. § 541; *Sierra Switchboard Co. v. Westinghouse Electric Corp.*, 789 F.2d 705, 707 (9th Cir. 1986) (citing *United States v. Whiting Pools, Inc.*, 462 U.S. 198, 205 n. 9 (1983)). It is equally clear that the Chapter 7 Trustee, as the court appointed representative of the estate, replaces the debtor and acts on the estate's behalf. 11

[6] *Compare In re Ben Cooper, Inc.*, 896 F.2d 1394 (2d Cir. 1990) (holding that bankruptcy court could conduct jury trial), *with In re Missouri Bank of Kansas City, N.A.*, 1990 U.S. App. Lexis 6290 (8th Cir. 1990) (rejecting Second Circuit's approach and holding that bankruptcy court could not conduct jury trial). It is significant to note that both *Ben Cooper* and *Missouri Bank* rely on the Supreme Court's recent decision regarding jury trials in bankruptcy cases, *Granfinanciera v. Nordberg*, 109 S. Ct. 2782 (1989), a decision that the *Ben Cooper* opinion describes as "opaque." 896 F.2d at 1400. Another court has expressed its disappointment in *Granfinanciera* by stating that the Supreme Court has failed to "offer a scintilla of specific guidance" in many of the matters that it addressed. *In re Owensboro Distilling Co.*, 108 B.R. 572, 573 (Bankr. W.D. Ken. 1989). The *Owensboro* court likened the question of jury trials in bankruptcy to the cinematic monsters "Freddy Krueger" of *Nightmare on Elmstreet* and "Jason" of *Halloween. Id.*, 108 B.R. at 575 n. 1.

U.S.C. §§ 323 & 704. Because the Trustee is the representative of the estate, his power to pursue the estate's causes of action are purely derivative: it is axiomatic that the Trustee cannot pursue a cause of action that the estate does not possess. Thus, if the estate lacks a jury trial right, then so does the Trustee.

Resolution of whether the Trustee, as representative of the estate, may claim a right to a jury trial when pursuing the estate's causes of action turns, in part, on interpretation of several Supreme Court decisions: *Granfinanciera, S.A. v. Nordberg*, 109 S. Ct. 2782 (1989) (hereinafter "*Granfinanciera*"); *Katchen v. Landy*, 382 U.S. 323 (1966), and *Commodity Futures Trading Commission v. Schor*, 478 U.S. 833 (1986). In *Katchen v. Landy*, the Supreme Court held that a creditor who participates in the bankruptcy proceedings by filing a proof of claim loses any right to a jury trial when the estate turns around and sues him to recover a preferential payment.[7] *Katchen* is relevant to this case because it establishes the principal that a voluntary participant in a bankruptcy proceeding is not constitutionally entitled to a jury trial of either his claims against the estate or the estate's counterclaims against him.[8] Courts addressing the issue since *Granfinanciera* have universally applied this principal to creditors, holding that a creditor who submits itself to the equitable jurisdiction of the bankruptcy court by filing a proof of claim forfeits any jury trial right, even though the creditor would otherwise have possessed such a right. *See, e.g., In re Paris Industries Corporation*, 106 B.R. 344, 345 (Bankr. D. Me. 1989); *In re Wheeling-Pittsburgh Steel Corporation*, 108 B.R. 82, 85 (Bankr. W.D. Pa. 1989). *See also Bayless v. Crabtree*, 108 B.R.

[7] In holding that a creditor who did *not* file a proof of claim did not waive its jury trial right, *Granfinanciera* nonetheless reaffirmed the holding in *Katchen v. Landy*. *Granfinanciera*, 109 S. Ct. at 2799.

[8] The Supreme Court's analysis in *Schor, supra*, reinforces this principal. In *Schor*, the Court held that the customer of a commodities broker who presented his reparation claims for adjudication by an administrative law judge lost any right to have the broker's state law counterclaims decided by an article III tribunal.

299, 304 (W.D. Okla. 1989) (party consented to jurisdiction of bankruptcy court and thereby waived right to jury trial when party filed counterclaim against estate).

There is no logical reason why this principal should not also apply to the debtor in this case, and, by logical extension, to the estate and the Trustee. As one court has observed, "[t]he debtor, by the filing of his bankruptcy petition, voluntarily subjected himself to the equitable powers of the bankruptcy court and, assuming, *arguendo*, [that he had] the right to a jury trial in the first instance, he has also arguably waived that right." *In re Edwards*, 104 B.R. 890, 893 (Bankr. E.D. Tenn. 1989).[9] Since the estate is the debtor's legal successor, and since the Trustee represents the estate in pursuing its causes of action, the Trustee is likewise limited to adjudication by the bankruptcy judge without the aid of a jury.[10] It is not logical that CNB, having filed a proof of claim, is prohibited from claiming a jury trial by virtue of its participation in the bankruptcy proceedings while at the same time the Trustee's participation in the same proceedings does not yield the same result.[11]

[9] In *Edwards*, the debtor claimed a right to a jury trial on his state law fraud, negligence and breach of contract claims. *Id.* at 892. The court in *dicta* rejected the debtor's jury claim on the basis of its interpretation of *Granfinanciera*. *Edwards*, 104 B.R. at 893, n. 5. On the other hand, the district court in this case rejected CNB's identical argument which was also premised on *Granfinanciera*.

[10] Alternatively, it is also undeniable that the Trustee voluntarily participated in the bankruptcy proceedings. Accordingly, like the creditor that loses any jury trial right by its participation, the Trustee should likewise be bound by his involvement, particularly since, unlike the creditor, the Trustee is a statutory creation of the Bankruptcy Code and is not specifically vested with any statutory right to a jury trial.

[11] One court has framed the test applicable to determine whether a party has a right to a jury trial in bankruptcy as follows:

> A determination of the right to a jury trial requires the Court to consider the following factors: (1) custom with reference to the issue in dispute prior to the merger of law and equity in the
>
> *(continued)*

In addition, the issue of whether the trustee possesses the right to a jury trial remains unsettled in spite of the Second Circuit's recent decision in *In re Ben Cooper, Inc.*, 896 F.2d 1394 (2d Cir. 1990). *Ben Cooper* involved a jury demand by three defendants: the Insurance Company of the State of Pennsylvania, Kalvin-Miller International, Inc. and Kerwick & Curran, Inc., none of whom filed a proof of claim. The case did not involve a jury demand by the debtor-in-possession, Ben Cooper, Inc.[12] Thus, the issue of whether the estate or its representative lost any right to a jury trial was not before the *Ben Cooper* Court. Although the Court in *Ben Cooper* cites the *Schor* decision, it does not do so in a manner that resolves the issues presented in this case. Moreover, the *Ben Cooper* opinion does not discuss *Katchen v. Landy*. Accordingly, the question raised in this petition remains unsettled.

Lastly, resolution of the issue at this time is compelling since it makes no sense to have a jury trial in this case. The Trustee's allegations involve whether CNB conducted itself improperly in the proceedings in the bankruptcy court.[13] For

[11] (continued)

> federal system; (2) the nature of the remedy sought; and (3) *whether the defendant has submitted to the jurisdiction of this Court by filing a proof of claim.*

In re Fort Lauderdale Hotel Partners, Ltd., 103 B.R. 335, 336 (Bankr. S.D. Fla. 1989) (emphasis added). Essentially, the district court in this case erred in failing to properly analyze whether the debtor, estate and/or Trustee had submitted to the jurisdiction of the bankruptcy court, thereby foregoing any jury trial right.

[12] In a Chapter 11 proceeding, the debtor-in-possession serves as the representative of the estate unless a trustee is appointed. By virtue of 11 U.S.C. § 1107(a), the debtor-in-possession in a Chapter 11 case possesses virtually all the powers of a trustee and is his functional equivalent.

[13] Both the bankruptcy court and the district court determined that the Trustee's causes of action were postpetition, core claims over which the bankruptcy court had appropriate jurisdiction pursuant to 28 U.S.C. § 157. The Trustee's claims focus on CNB's alleged misconduct in its capacity

(continued)

example, one of the Trustee's allegations is that CNB improperly obtained the court order directing conversion of the debtor's case to a Chapter 7 liquidation. It is inconceivable that a jury may sit in judgment of this order. A Trustee who is unhappy with the outcome of a bankruptcy proceeding is not entitled to seek review by a jury over what went on in the bankruptcy court. *See In re Edwards*, 104 B.R. at 893 (citing *Granfinanciera*) (stating in *dicta* that a creditor or debtor who voluntarily submits to the equitable jurisdiction of the bankruptcy court waives right to a jury trial). Also, the Trustee's claims for damages against CNB are appropriately counterclaims to CNB's financial claims against the estate since the Trustee's claims arise out of the same financial relationship. Rule 13, F.R.Civ.P. *See In re Summit Ridge Apartments, Ltd.*, 104 B.R. 405, 407 n. 3 (Bankr. N.D. Ala. 1989) (debtor's claims of wrongdoing against secured creditor held to be counterclaims to creditor's proof of claim). Accordingly, the Trustee's claims are for the bankruptcy court to decide in the exercise of its equitable jurisdiction without a jury. *See Bayless v. Crabtree*, 108 B.R. at 305 (citing *Granfinanciera*, 109 S. Ct. at 2799 n. 14; *Katchen v. Landy*, 382 U.S. at 338) ("[a]lthough they may be legal and otherwise amenable to jury trial under the seventh amendment, contrary assertions of right by trustees or debtors are open to adjudication in equity by Bankruptcy Judges under their powers to afford complete relief as to the controversy at bar"). *See also Hughes-Bechtol, Inc.*, 107 B.R. 552, 556 (Bankr. S.D. Ohio 1989) (in addition to waiving jury trial claim by filing proof of claim, party "has otherwise created an equitable proceeding in which the bankruptcy court is authorized to determine all issues without a jury").

For these reasons, the district court decided the controlling question of law in a manner contrary to precedent. Accord-

[13] *(continued)*

as the postpetition finance entity for the debtor's estate during the debtor's reorganization efforts. CNB's postpetition financial relationship with the estate arose out of the postpetition financing order entered by the bankruptcy court.

ingly, the question presented in this petition is a controlling question of law over which there is a substantial basis for difference of opinion.

STATEMENT WHY AN IMMEDIATE APPEAL MAY MATERIALLY ADVANCE THE ULTIMATE TERMINATION OF THE LITIGATION

Section 1292(b) also requires that an immediate appeal of the issue may materially advance the ultimate termination of the litigation. An immediate appeal in this case may materially advance the ultimate termination of the litigation since a bench trial in the bankruptcy court would be substantially more efficient and far less time-consuming than a jury trial in the bankruptcy court, or in some other forum yet to be determined.[14] *See McDonnell Douglas Finance Corporation v. Pennsylvania Power & Light Company*, 849 F.2d 761, 765 (2d Cir. 1988) (noting that "immediate appeal at this juncture might well advance the ultimate termination of this dispute by putting the parties before the proper tribunal as soon as possible"). Furthermore, since the District Court has already reviewed the issues which are the subject of the planned appeal, it would be a manifest waste of time to cut the appellate process in half at this point, only to be resumed in full upon entry of a final adverse judgment at some later date. *See Ford Motor Credit Company v. S.E. Barnhart & Sons*, 664 F.2d 377, 380 (3d Cir. 1981) (stating that § 1292(b) "is designed to allow for early appeal of a legal ruling when resolution of

[14] The district court remanded the case to the bankruptcy judge to determine the propriety of conducting the jury trial in the bankruptcy court. Accordingly, where the case will be tried has yet to be determined. Obviously, there is great potential for delay if the case is transferred by the bankruptcy court for jury trial elsewhere. However, if this Court determines that the Trustee lacks a jury trial right, then the need for such a determination ig avoided and the trial may proceed expeditiously before the bankruptcy judge, serving the interests of judicial economy and preserving the limited resources of the bankruptcy estate which must ultimately bear the Trustee's litigation expenses.

the issue may provide more efficient disposition of the litigation"). Similarly, if the district court's determination is erroneous, it would be a manifest waste of time to conduct a jury trial in some as yet undetermined forum only to have to retry the case a second time after a later appeal. Alternatively, a later appeal may be unavailing since an adverse decision by a jury may be binding on CNB under principles of *res judicata* in spite of the fact that the case should have been tried to the court.[15] *See Sea-Land Services, Inc. v. Gaudet*, 414 U.S. 573, 578-79 (1974) (quoting *Commissioner v. Sunnen*, 333 U.S. 591 597 (1948)) (stating that *res judicata* applied to bar relitigation absent some factor invalidating the judgment). Additionally, an appeal at this time would not itself unduly delay the proceedings since the issue to be decided is discrete, has been fully brief to the district court, and, accordingly, may be resolved on an expedited basis.

[15] Similarly, even if the district court's determination is erroneous, it arguably may not constitute "reversible error" following a jury trial. To warrant reversal after judgment, two conditions must be shown: error and injury. "A judgment will not be reversed where reversal would be of no benefit to the appellant because the same judgment would have to be entered on retrial . . . ." 5 Am. Jur. 2d § 948 at 375. Arguably, it may be impossible to demonstrate that a judge would make factual determinations any differently than the jury. Accordingly, unless the order is reviewed at this time, CNB may be left without any real opportunity to seek review at a later date.

However, if CNB is left without an effective appeal after final judgment, then this Court possesses jurisdiction at this time to review Judge Dorsey's decision under the collateral order doctrine. To be reviewable as an interlocutory collateral order, a matter must (1) conclusively determine a disputed question; (2) resolve an important question completely separable from the merits of the action; and (3) be effectively unreviewable on appeal from a final judgment. *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978); *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546 (1949). The disputed question resolved by the district court was whether the Trustee is entitled to a jury trial. This issue is separable from the merits in that it does not decide the merits but only determines who the factfinder will be. The matter is important since it involves interpretation of the Seventh Amendment. For these reasons, the Court may possess jurisdiction on this alternative basis.

Finally, consideration of general principles of bankruptcy procedure also suggests that an appeal should be taken at this time. Rule 9015 of the Rules of Bankruptcy Procedure formerly provided the procedure for jury trials in bankruptcy cases. The rule was abrogated as of March 30, 1987 . The advisory committee states that "[i]n the event the courts of appeals or the Supreme Court define a right to a jury trial in any bankruptcy matters, a local rule in substantially the form of Rule 9015 can be adopted pending amendment of these rules." *See In re Ben Cooper*, 896 F.2d at 1403 (citing this provision). Whether or not a trustee may claim a jury trial in a bankruptcy case may bear upon the procedural rule that may be crafted to implement that right. Accordingly, an appeal at this time is provident.

Since an appeal at this time may materially advance the ultimate termination of the litigation and would likely avoid needless expense and duplication of effort at a later date, and would also serve other important interests, CNB's petition should be granted.

PETITIONER,
THE CONNECTICUT
NATIONAL BANK

By /s/ Eric Brunstad, Esq.

Eric Brunstad, Esq.
Janet C. Hall, Esq.
Robinson & Cole
One Commercial Plaza
Hartford, CT 06103
(203) 275-8204

CERTIFICATION

This is to certify on this 25th day of May, 1990, two copies of the Petition for Permission to Appeal and the appendices attached thereto, the Affidavit of G. Eric Brunstad, the Notice of Motion, and the Notice of Appearance of G. Eric Brunstad were sent via first class mail, postage prepaid, to Thomas M. Germain, Esq., 10 Columbus Boulevard, Hartford, CT 06103.

/s/ G. Eric Brunstad
G. Eric Brunstad

APPENDIX A

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

THOMAS GERMAIN, TRUSTEE FOR :
THE ESTATE OF O'SULLIVAN'S
FUEL OIL CO., INC.

-vs- : Civil No.
H-89-663 (PCD)

THE CONNECTICUT NATIONAL :
BANK

RULING ON BANKRUPTCY APPEAL

On September 6, 1989, Judge Krechevsky, Chief Bankruptcy Judge, denied CNB's motion to strike the trustee's request for trial by jury in an adversary proceeding and, since both parties agreed that the bankruptcy court had no authority to conduct a jury trial, he directed the parties to take appropriate steps to remove the proceeding from the bankruptcy court. On November 14, 1989, this court granted CNB's motion for leave to appeal Judge Krechevsky's ruling.

The following are the facts and procedural history as set forth by the bankruptcy court. As they are not contested, they will be adopted for the purposes of this appeal. Debtor, O'Sullivan's Fuel Oil, Inc., filed a voluntary Chapter 11 petition on January 18, 1984. The case was converted to a proceeding under Chapter 7 on July 30, 1986, and a trustee was appointed. On June 1, 1987, the trustee commenced suit against CNB in Superior Court claiming that CNB is liable to the estate in money damages for willful interference with the debtor's business, collusion and duress, fraudulent misrepresentation, violation of RICO, breach of obligation to act in good faith, and violation of CUTPA.

Trustee's claim alleged that: The debtor was in the business of selling fuel oil to retail accounts. During 1981, debtor borrowed $500,000 from First Bank, which merged with CNB in March 1984. First Bank received a mortgage lien on the debtor's fuel oil storage facility as security. CNB has filed a proof of claim in the bankruptcy proceedings. Starting in November 1983, approximately two months prior to the filing of the debtor's bankruptcy petition, First Bank undertook to exercise control of the debtor in order to serve First Bank's own interests. First Bank demanded that one James Tisdale be placed in control of the debtor's business and recommended that debtor file a Chapter 11 petition utilizing a law firm selected by the bank. After the filing of the petition, First Bank or CNB required the debtor to replace its insurance agency: insisted that Tisdale and his brother remain in control of debtor's business when they had no competence to operate the business and wasted its assets; resisted shareholder efforts to oust the Tisdales by threatening to terminate financing and force the business to close; encouraged the organization of a successor corporation by the Tisdales to take over debtor's assets; and misused court-approved financing to satisfy its pre-petition debt. These actions continued until the Tisdales relinquished control in August 1984.

CNB removed the trustee's action to bankruptcy court on July 15, 1987. *See* 28 U.S.C. § 1452; Bankruptcy Rule 9027. After CNB answered, the trustee filed a timely request for a jury trial. This court subsequently dismissed the trustee's RICO claim, approved Judge Krechevsky's recommendation that the proceeding in issue is a core proceeding as it arose, for the most part, in a bankruptcy proceeding under Chapter 11, and denied the trustee's motion to withdraw the reference.

CNB then moved to strike the trustee's demand for a jury trial. Judge Krechevsky determined that the trustee has a right to a jury trial in an adversary proceeding he commenced in state court to recover monetary damages for torts and contract violations allegedly committed by CNB and First Bank, post-petition, and denied CNB's motion to strike. He also

ordered the parties to remove the case from the bankruptcy court based on their agreement that the bankruptcy court has no authority to conduct such a jury trial.

Discussion

CNB argues that the estate, acting through a Chapter 7 trustee, has no right to a jury trial when it sues a creditor who has filed a proof of claim on the basis of the creditor's post-petition misconduct while the case was subject to the jurisdiction and supervision of the bankruptcy court. Thus CNB contends that this case arises out of the restructuring of debtor/creditor relations in the bankruptcy proceeding and should be tried by the bankruptcy court, not a jury.

Judge Krechevsky relied primarily on *Granfinanciera, S.A. v. Nordberg*, 492 U.S. ___, 109 S. Ct. 2782 (1989), in holding that the trustee has a right to a jury trial under the Seventh Amendment. In that case, the trustee sued petitioners in the bankruptcy court seeking to avoid allegedly fraudulent transfers to them by the bankrupt corporation. The bankruptcy code designates such fraudulent conveyance actions as "core proceedings" which may be adjudicated by the bankruptcy court. 28 U.S.C. § 157(b)(2)(H). The Supreme Court held that at common law parties to a fraudulent conveyance action were entitled to a jury trial and that Congress, in designating such as a "core" proceeding, could not eliminate a party's Seventh Amendment right to a jury trial.

Whether petitioners had a Seventh Amendment right to a jury trial requires a two step analysis. First, the court must determine whether the cause of action would have been tried to a jury at common law and if so, whether the remedy sought is legal rather than equitable in nature. Second, the court must consider "whether Congress may assign and has assigned resolution of the relevant claim to a non-Article III adjudicative body that does not use a jury as factfinder."

That the action has been designated as "core" is not controlling. The Supreme Court undertook a "public rights-private rights" analysis to resolve the second element. If the cause implicates a public right, Congress can deny the parties a jury trial without violating the Seventh Amendment. Public rights are defined as "statutory rights that are integral parts of a public regulatory scheme and whose adjudication Congress has assigned to an administrative agency or specialized court of equity." *Granfinanciera*, 109 S. Ct. at 2797 & n.10; *see Northern Pipeline Constr. Co. v. Marathon Pipeline Co.*, 458 U.S. 50, 71 (1982) (Article I courts can adjudicate claims at the core of bankruptcy because such claims are public rights, and central to Congress' constitutional bankruptcy power). If a private right is involved, Congress cannot affect the party's Seventh Amendment right to a jury trial. A private right is defined as "the liability of one individual to another under the law as defined," such as "[w]holly private tort, contract, and property cases." *Granfinanciera*, 109 S. Ct. at 2795 & n.8.

CNB contends since the trustee's claims arise out of the alleged mishandling of the post-petition administration of the bankruptcy estate, they require a determination of equitable rights arising during the course of the bankruptcy proceedings and thus are not claims at law within the meaning of the Seventh Amendment. Judge Krechevsky held that the trustee's "complaint, bottomed on allegations of tort and contract violation, seeks money damages and presents a legal claim triable before a jury." Ruling on Motion to Strike at 8. CNB concedes that monetary damages are generally a legal remedy and that the state law claims appear on their face to be legal in nature. However, it contends that resolution of the claims would require not only a working knowledge of bankruptcy law but also application of bankruptcy law.

That the alleged misconduct arose post-petition, while the case was under the jurisdiction and supervision of the bankruptcy court, does not transform the estate's claims into ones arising under the bankruptcy court's equitable jurisdiction. The trustee is not challenging the administration of the bankruptcy proceeding but contends that CNB and its predecessor First Bank exercised unlawful influence and control over the debtor to its advantage and to the detriment of the debtor. Although the estate's claims will have to be considered in the context of a bankruptcy proceeding, it does not strip them of their legal nature.

CNB next argues that this case is distinguishable from *Granfinanciera* because the estate, not the creditor, is the party claiming a jury trial. Judge Krechevsky dealt with this argument by asserting that he saw "no logical basis for denying a plaintiff bankruptcy trustee the same right to claim a jury trial otherwise available to a defendant in the litigation." Ruling on Motion to Strike at 8. CNB argues that *Katchen v. Landy*, 382 U.S. 323 (1966), vests the bankruptcy court with full authority to adjudicate the trustee's claims under its equitable jurisdiction. In *Katchen*, a creditor who filed a proof of claim against the estate claimed that he was entitled to have the estate's preference action against him adjudicated before a jury. The Supreme Court reasoned that by submitting a claim against the bankruptcy estate, creditors subject themselves to the courts equitable power to disallow those claims, even though the debtor's opposing counterclaims are legal in nature.

CNB argues that since it has filed a proof of claim, the trustee is barred from claiming a jury trial on its counterclaims CNB, however, misconstrues the nature of the trustee's claims and their relationship to its proof of claim. In *Katchen*, the trustee objected to allowance of the creditor's claim and brought an action to surrender a preference allegedly held by the creditor. The objection to the creditor's proof of claim was based solely on his receipt of the allegedly voidable preference. *Katchen*, 382 U.S. at 330. Thus the allowance of the claim was necessarily tied to resolution of the preference issue. In this case, the trustee's claims are not necessary to the determination of CNB's proof of claim. The trustee asserts that he has not objected to CNB's claim, nor challenged the validity of the notes underlying the proof of claim. Rather, he is

seeking damages against CNB with respect to its post-petition conduct in an effort to increase the size of the estate.

CNB also argues that the estate, and the trustee as its representative, are subject to the consequences of submitting this case to the jurisdiction of the bankruptcy estate by filing a petition in bankruptcy, including the loss of the right to a jury trial for the adjudication of post-petition claims that arise out of the administration of the estate. This argument has been implicitly rejected by the Second Circuit. *In re Ben Cooper, Inc.*, No. 89-5026, 1990 U.S. App. LEXIS 2094 (2d Cir. Feb. 7, 1990). In that case, the debtor in possession[1] commenced an adversary proceeding in the bankruptcy court in relation to a post-petition insurance contract. The debtor sought a declaratory judgment that the policy remained in effect and damages from its insurance brokers for alleged negligence and malpractice in procuring the policy. The court found this claim to be intrinsically related to estate administration and thus within the bankruptcy court's core jurisdiction. Although the court held that resolution of the debtor's post-petition state law claims was an essential part of administering the estate, it concluded that the claims were inherently legal and thus the defendants in the adversary proceeding were entitled to a jury trial. That the claims arose from post-petition conduct and were intimately related to estate administration did not affect the defendants' Seventh Amendment rights. As noted by Judge Krechevsky, there is no logical reason not to extend this same right to a jury trial to the trustee.

Finally, having found the trustee's tort and contract claims to be legal in nature and subject to the Seventh Amendment's protection of the right to a jury trial, it must be determined whether the claims implicate public rights and thus are subject to Congressional deprivation of the right to a jury trial. The trustee's claims are based solely on state law theories and not on any congressionally-created right that is "an integral part of a public regulatory scheme." "[S]tate-law contract claims brought by a bankrupt corporation to augment the bankruptcy estate . . . [are] matters of private rather public right." *Granfinanciera*, 109 S. Ct. at 2798. The trustee is entitled, pursuant to the Seventh Amendment, to a jury trial on the claims in issue.

Judge Krechevsky ordered the parties to remove the adversary proceeding from the bankruptcy court because "both parties agree[d] that the bankruptcy court has no authority to conduct a jury trial so that that issue, expressly left undecided by *Granfinanciera*, [wa]s not before [him] for a ruling." Ruling on Motion to Strike at 8. Subsequent to Judge Krechevsky's ruling and after the appeal sub judice was briefed, the Second Circuit "f[ou]nd that *Granfinanciera* does not foreclose the possibility of jury trials in the bankruptcy court." *Cooper*, slip op. at 1598. The court found no constitutional or statutory bar to a bankruptcy court holding a jury trial in a core proceeding. In view of the fact that this adversary proceeding was commenced in 1987 and the substantial potential for further delay if the case is to be removed from the bankruptcy court to be tried in an as yet undetermined forum, the matter will be remanded to the bankruptcy court for consideration, in light of the *Cooper* case, of the issue of whether it can conduct a jury trial on the trustee's claims in this action.

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[1] A debtor in possession has all the rights and powers of a trustee. 11 U.S.C. § 1107(a). In addition, the trustee stands in the shoes of the debtor and can only assert claims on behalf of the estate possessed by the debtor, subject to all defenses valid against the debtor. Accordingly, that an action is commenced by the trustee rather than the debtor would be irrelevant for Seventh Amendment purposes.

Summary

CNB's appeal of the denial of its motion to strike is dismissed. Judge Krechevsky's ruling that the trustee is entitled to a jury trial in the adversary proceeding in issue is affirmed. The matter is remanded to the bankruptcy court for consideration of the propriety of conducting such jury trial in the bankruptcy court.

SO ORDERED.

Dated at Hartford, Connecticut, this 22nd day of March, 1990.

/s/ Peter C. Dorsey
Peter C. Dorsey
United States District Judge

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

THOMAS M. GERMAIN, TRUSTEE FOR THE ESTATE OF O'SULLIVAN'S FUEL OIL CO., INC.	)	
-vs-	)	CIVIL NO. H-89-663 (PCD)
THE CONNECTICUT NATIONAL BANK	)	APRIL 2, 1990

MOTION TO AMEND ORDER

Pursuant to 28 U.S.C. § 1292(b), Rule 52(b) F.R.Civ.P., and Rule 5(a) F.R.App.P., The Connecticut National Bank ("CNB") hereby moves the Court to amend its Order of March 22, 1990 in the above-captioned proceeding to add the following statement:

> The Order of the Court involves a controlling question of law as to which there is substantial ground for difference of opinion and an immediate appeal from the order may materially advance the ultimate termination of the litigation.

In support therefore, CNB respectfully represents as follows:

5/16/90: Granted absent opposition, Local Rule 9(a)(1), and for the reasons set forth in this court's ruling on motion for leave to appeal which permitted CNB to appeal to this court under the standards in 28 U.S.C. § 1292(b). SO ORDERED.

/s/ Peter C. Dorsey, USDJ
Peter C. Dorsey, USDJ

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
August Term, 1989

(Submitted July 17, 1990 Decided: (February 15, 1991)
Docket No. 90-8054

THOMAS M. GERMAIN, TRUSTEE FOR
THE ESTATE OF O'SULLIVAN'S
FUEL OIL CO., INC.,
Plaintiff-Respondent,

V.

THE CONNECTICUT NATIONAL BANK,
Defendant-Petitioner.

Before: WINTER, MAHONEY and WALKER,
Circuit Judges.

Petitioner seeks leave to appeal from a district court order affirming an interlocutory order of the bankruptcy court. We hold that we have no jurisdiction and dismiss the petition.

Thomas M. Germain, Hartford, Connecticut, *for Plaintiff-Respondent.*

G. Eric Brunstad, Hartford, Connecticut (Janet C. Hall, Robinson & Cole, Hartford, Connecticut, of counsel), *for Defendant-Petitioner.*

WINTER, Circuit Judge:

This petition for leave to appeal raises the question of whether we have appellate jurisdiction under 28 U.S.C. § 1292(b) to review a district court order affirming an interlocutory order entered by the bankruptcy court. This issue turns on whether 28 U.S.C. § 158(d) precludes by negative implication interlocutory review under Section 1292. We conclude that it does and dismiss the petition.

BACKGROUND

In 1981, O'Sullivan's Fuel Oil Co., Inc. ("O'Sullivan") borrowed $500,000 from First Bank. As security, First Bank, which later merged with The Connecticut National Bank ("CNB"), received a mortgage lien on O'Sullivan's fuel oil facility. O'Sullivan's fortunes declined, and, on January 18, 1984, it filed a voluntary petition for reorganization under Chapter 11 of the Bankruptcy Code, 11 U.S.C. §§ 1101-74 (1988). CNB in turn filed a proof of claim. Two and one-half years later the bankruptcy court converted the Chapter 11 reorganization into a Chapter 7 liquidation, *see* 11 U.S.C. §§ 701-66 (1988), and appointed Thomas M. Germain as Trustee for the debtor's estate.

On June 1, 1987, Germain, as Trustee, commenced an action against CNB in a Connecticut state court. The suit alleged that beginning in November 1983, roughly two months before O'Sullivan filed for bankruptcy protection, First Bank attempted to assume control of the company by demanding *inter alia* that O'Sullivan surrender control of the business and its assets to an individual of the Bank's choosing, that O'Sullivan file a Chapter 11 proceeding utilizing a law firm selected by the Bank, and that O'Sullivan replace its insurance agency. Based on these and subsequent alleged efforts to assert control, the Trustee sought damages based on various claims sounding in tort and contract, a claim under the Connecticut Unfair Trade Practices Act, Conn. Gen. Stat. Ann. §§ 42-110a to -110q (West 1987 & Supp. 1990), and, of course, a claim under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961-68 (1988).

CNB removed the action to bankruptcy court, whereupon the Trustee filed a demand for a jury trial and moved to withdraw the bankruptcy court's reference. After the district court dismissed the Trustee's RICO claim and denied his motion to withdraw the bankruptcy reference, CNB moved before the bankruptcy court to strike the Trustee's jury demand. The bankruptcy court denied CNB's motion on the ground that the Trustee was seeking money damages based on tort and contract claims and thus was entitled to a jury trial. CNB sought leave to appeal to the district court which was granted pursuant to 28 U.S.C. § 158(a). The district court affirmed and thereafter certified an interlocutory appeal under 28 U.S.C. § 1292(b). CNB seeks leave to appeal as provided by Fed. R. App. P. 5(a).

DISCUSSION

Appellate jurisdiction over bankruptcy court decisions exists in district courts pursuant to 28 U.S.C. § 158(a)[1] or in bankruptcy appellate panels in circuits where such a panel has been established under Section 158(b).[2] Section 158(d) provides for review by courts of appeals of "final" orders of a district court or bankruptcy panel.[3] Because Section 158(d) does not provide for court of appeals jurisdiction over interlocutory orders of a district court reviewing an order of a bankruptcy court, CNB seeks to invoke our jurisdiction under 28 U.S.C. § 1292(b).[4]

Although both parties appear desirous of our hearing the appeal, we *sua sponte* address the question whether Section 158(d) precludes by negative implication appellate jurisdiction under Section 1292(b) of interlocutory decisions rendered under Section 158(a). This issue is not without difficulty. Unless Section 158(d) provides the exclusive means of court of appeals review of orders entered under Subsection (a), it is arguably superfluous because courts of appeals already have appellate jurisdiction under 28 U.S.C. § 1291 over final decisions of district courts. If Section 158(d) is exclusive, of course, then we have no jurisdiction under Section 1292(b).

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[1] Section 158(a) reads:

> The district courts of the United States shall have jurisdiction to hear appeals from final judgments, orders, and decrees, and, with leave of the court, from interlocutory orders and decrees, of bankruptcy judges entered in cases and proceedings referred to the bankruptcy judges under section 157 of this title. An appeal under this subsection shall be taken only to the district court for the judicial district in which the bankruptcy judge is serving.

28 U.S.C. § 158(a) (1988).

[2] Section 158(b) reads in pertinent part:

> (1) The judicial council of a circuit may establish a bankruptcy appellate panel, comprised of bankruptcy judges from districts within the circuit, to hear and determine, upon the consent of all the parties, appeals under subsection (a) of this section.
>
> (2) No appeal may be referred to a panel under this subsection unless the district judges for the district, by majority vote, authorize such referral of appeals originating within the district.

28 U.S.C. § 158(b) (1988).

[3] Section 158(d) reads:

> The courts of appeals shall have jurisdiction of appeals from all final decisions, judgments, orders, and decrees entered under subsections (a) and (b) of this section.

28 U.S.C. § 158(d) (1988).

[4] Section 1292(b) reads, in pertinent part:

> When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order
>
> . . . .

28 U.S.C. § 1292(b) (1988).

However, reading Section 158(d) as the exclusive basis for appellate jurisdiction creates an anomaly in that a district court may withdraw any matter from the bankruptcy court under 28 U.S.C. § 157(d), and its decisions are thereafter reviewable under Sections 1291 and 1292. *See In re Sonnax Industries, Inc.*, 907 F.2d 1280, 1282-83 (2d Cir. 1990). If Section 158(d) is exclusive, then interlocutory orders entered by district courts that have withdrawn a case under Section 157(d) would be reviewable, if injunctive in nature, under Section 1292(a)(1) or, if not injunctive, upon certification under Section 1292(b), while identical interlocutory orders entered under Section 158(a) would be unreviewable. It is tempting, therefore, to say that interlocutory orders entered under Section 158(a) are reviewable under Section 1292. However, that may create a new anomaly. Section 158(d) provides appellate jurisdiction for final orders entered under Subsections (a) and (b). Subsection (b) provides for the creation and operation of appellate panels of bankruptcy judges, and, arguably, it would overly stretch Section 1292 to hold that an order entered by such an appellate panel under Subsection 158(b) might be subject to review as an interlocutory injunction under Section 1292(a)(1) or discretionary review after certification under Section 1292(b).

Our cases are in disarray on the jurisdictional question. In *In re Johns-Manville Corp.*, 824 F.2d 176 (2d Cir. 1987), we held that the district court's affirmance of an order denying a request for appointment of a shareholders' committee was non-final within the meaning of Section 158(d). In doing so, we relied on the view that the law provides

> adequate avenues of immediate appellate review for denial of motions to appoint shareholder committees without automatic, immediate access to the courts of appeals during the pendency of a bankruptcy proceeding. Under 28 U.S.C. § 158(a), district courts are authorized to review interlocutory orders of the bankruptcy courts. Moreover, district courts may certify for appeal to the courts of appeals any interlocutory order meeting the statutory criteria of 28 U.S.C. § 1292(b).

Id. at 180. Our next brush with this issue was *LTV Corp. v. Farragher (In re Chateaugay Corp.)*, 838 F.2d 59 (2d Cir. 1988). That case involved Section 1292(a)(1) rather than Section 1292(b), but we perceive no principled grounds for distinguishing between these subsections for purposes of determining our appellate jurisdiction. *LTV* held that we lacked jurisdiction to hear an appeal from a district court's vacating and remanding an injunctive order entered by the bankruptcy court for entry of a new order. In doing so, *LTV* stated:

> Nor are we persuaded by the argument . . . that sections 1291 and 1292 of Title 28 (allowing appeals from district court final decisions and certain interlocutory orders, 28 U.S.C. §§ 1291, 1292) provide jurisdiction in this case. The order . . . is not final as required by section 1291, and, while we have recognized the applicability of section 1292 to determinations made by a district court sitting in bankruptcy, *see In re Feit & Drexler, Inc.*, 760 F.2d 406, 411-13 (2d Cir. 1985), we believe that section 158(d) remains the exclusive basis for jurisdiction for decisions entered under paragraphs (a) and (c) of section 158. . . . Therefore, our finding that the district court's decision was not final requires us to conclude that we have no authority to hear this action under section 158(d).

Id. at 62-63. *LTV* made no mention of *Johns-Manville*, although the pertinent language in *LTV* is, in contrast to the language in *Johns-Manville*, clearly a holding.

LTV, however, appears never to have been cited for that holding, perhaps because the West Publishing Co. did not accord a headnote to it. The next year, *NLRB v. Goodman*, 873 F.2d 598 (2d Cir. 1989), held to the contrary without refer-

ring to LTV. In that case, we reviewed a district court's remand of an issue that was related to an interlocutory injunction. We held:

> Ordinarily, a remand to the bankruptcy court by a district court is not a final, appealable order under 28 U.S.C. § 158(d) (1982), unless the remand effectively settles an issue and orders the bankruptcy court to perform merely a ministerial task. *See In re Vekco, Inc.*, 792 F.2d 744 (8th Cir. 1986); *In re Fox*, 762 F.2d 54 (7th Cir. 1985). In this case, however, the Bankruptcy Court effectively enjoined the Labor Board from proceeding against Goodman and [another party]. The District Court's order, although remanding a substantive issue for reconsideration by the Bankruptcy Court, refused to dissolve the injunction. The order is therefore appealable under 28 U.S.C. § 1292(a)(1) (1982).

Id. at 601-02. Since then, in *New York State Department of Taxation and Finance v. Hackeling (In re Luis Elec. Contracting Corp.)*, 917 F.2d 713, 716-17 (2d Cir. 1990), we have exercised appellate jurisdiction, without addressing the issue, over an interlocutory injunction issued by a bankruptcy court and affirmed by a district court.

The disarray of our decisions is matched by similar disagreements among the circuits, which are amply described in *Capitol Credit Plan of Tennessee, Inc. v. Shaffer*, 912 F.2d 749 (4th Cir. 1990), and need not be detailed here. Although *Goodman* appears to be our latest holding on this matter, we address the issue *de novo* and have circulated this opinion to the active members of the court. *See United States v. Reed*, 773 F.2d 477, 478 (2d Cir. 1985).

We conclude that Section 1292(b) does not provide jurisdiction in the instant matter. To be sure, nothing in Section 158(d) expressly negates jurisdiction. That provision simply does not mention interlocutory appeals. The fact that it would

appear to be superfluous if not our exclusive source of our jurisdiction does, however, imply that it is exclusive. More importantly, the legislative history of Section 158(d) indicates that Congress intended to limit court of appeals jurisdiction over decisions of bankruptcy courts to final decisions.

Section 158(d)'s predecessor was 28 U.S.C. § 1293(b), which differed in language but not in substance. *See* Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, § 236(a), 92 Stat. 2549, 2667. Although enacted in 1978, Section 1293(b)'s effective date was in 1984. *See id.* at § 402(b), 92 Stat. 2549, 2682. Before it became effective, Section 158(d) was passed, apparently as a substitute for Section 1293(b). *See* Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, § 104, 98 Stat. 333, 341. Most of the pertinent legislative history, therefore, is in the Bankruptcy Act of 1978.

The course of events in Congress leading to passage of Section 1293(b) appears to have been as follows. The bill passed by the House, H.R. 8200, would have conferred Article III status upon bankruptcy judges and would have treated bankruptcy courts as on a par with district courts. It thus would have eliminated the long-standing practice of appellate review of bankruptcy court decisions by district courts and would have amended Section 1291 to provide for direct appellate review of bankruptcy decisions by courts of appeals. It similarly would have amended Section 1292 to provide for direct appeals from interlocutory orders of bankruptcy courts in the case of injunctions or certified questions. H.R. 8200, 95th Cong., 2d Sess., 124 Cong. Rec. 1786 (Feb. 1, 1978) (setting forth sections 237-39 of bill); *id.* at 1804 (passage of bill). That the implications of this were fully understood is made clear by the discussion in the relevant House Report concerning these provisions and in particular their impact on the caseload of the courts of appeals. H.R. Rep. No. 595, 95th Cong., 2d Sess. 40-43, *reprinted in* 1978 U.S. Code Cong. & Admin. News 5963, 6001-04.

The Senate bill, S. 2266, as reported out by the Judiciary Committee, did not confer Article III status on bankruptcy judges and would have continued the practice of appeals to the district courts. It contained no explicit provision for subsequent review by the courts of appeals. The Senate Judiciary Committee Report did contain the puzzling statement that "[a]ppeals may be taken by writ of certiorari from the district court to the United States court of appeals ... 28 U.S.C. § 1291." S. Rep. No. 989, 95th Cong., 2d Sess. 18, *reprinted in* 1978 U.S. Code Cong. & Admin. News 5787, 5804. There was, however, no provision in S. 2266 establishing a certiorari procedure, and the Report's remark may well have reflected a misunderstanding of Section 1291. In any event, on the Senate floor, the text of S. 2266 was substituted for the text of H.R. 8200. 124 Cong. Rec. 28284 (Sept. 7, 1978).[5] When this substitution was made, the provisions of S. 2266 relevant to the instant matter were as reported out of the Judiciary Committee.

Although the House and Senate versions of H.R. 8200 differed, no conference was held. Instead, on September 28, the House voted to accept the Senate version of H.R. 8200 subject to further amendments. 124 Cong. Rec. 32350, 32420 (Sept. 28, 1978). In accepting the Senate version, the House abandoned the original provisions of H.R. 8200 that had amended Sections 1291 and 1292 to allow direct appeals from final and interlocutory orders of bankruptcy courts to courts of appeals. However, the House also added amendments to the substitute, three of which are pertinent to the instant matter. First, it created a new Section 1293 in Title 28 that provided for court of appeals jurisdiction over final decisions of the new bankruptcy panels and court of appeals jurisdiction over final decisions of bankruptcy courts if the parties agreed

[5] Two weeks later, Senator Byrd requested and received unanimous consent to vitiate the passage of H.R. 8200 and offer an amendment in the nature of a substitute deleting certain references to federal taxes and certain provisions that amended the federal tax laws. 124 Cong. Rec. 30960 (Sept. 22, 1978). However, that detour has no bearing on the jurisdictional amendments here pertinent.

to such a direct appeal. 124 Cong. Rec. 32385 (Sept. 28, 1978). Second, Section 1334 of Title 28 was amended to provide for appellate review by district courts of final orders of bankruptcy courts and district court review of interlocutory orders of bankruptcy courts but only by leave of the district court. *Id.* Third, it provided for review of final decisions and interlocutory decisions (again upon leave) of bankruptcy courts by appellate bankruptcy panels in a new 28 U.S.C. § 1482. *Id.* at 32386. None of the September 28 amendments addressed court of appeals jurisdiction over decisions of district courts reviewing decisions of bankruptcy courts.

The action then returned to the Senate. The Senate concurred in the House's amendments, but added yet further amendments of its own. 124 Cong. Rec. 33989-34019 (Oct. 5, 1978). One of the October 5 Senate amendments added language to the new Section 1293(b) that was in substance what is now provided by Section 158(d), namely court of appeals jurisdiction over "final" decisions of district courts reviewing a bankruptcy court. *Id.* at 33991. The House then adopted the Senate amendments. 124 Cong. Rec. 34143 (Oct. 6, 1978).

In 1984, Congress adopted with only cosmetic changes the scheme of the 1978 Act concerning appellate review. Section 158(a) provided for district court review of final bankruptcy court orders and district court review of interlocutory bankruptcy court decisions by leave of the district court. Section 158(d) provided for court of appeals review of final decisions of a district court reviewing decisions of a bankruptcy court. The only further wrinkle occurred when Congress added the procedure for district court withdrawal of a matter from the bankruptcy court. 28 U.S.C. § 157(d). No appellate procedures were provided for decisions in withdrawn cases, and Section 1291 and 1292 are applicable in light of the fact that withdrawn cases are within the original jurisdiction of district courts. *See In re Sonnax Industries, Inc.*, 907 F.2d 1280, 1282-83 (2d Cir. 1990).

Some of the confusion concerning Section 158(d) may have arisen from the complexity of the interplay between the two houses of the Congress and the lack of commentary on issues concerning court of appeals jurisdiction during proceedings on the floor. The House Committee Report, as noted, contained an explicit discussion of the issue. The Senate Report, as also noted, was more enigmatic and perhaps reflected a misunderstanding of appellate jurisdiction as it existed at the time. Although major changes occurred thereafter, including deletion of the provisions of H.R. 8200 that would have authorized review under Sections 1291 and 1292, there was no commentary on the floor of either House regarding these changes, and the lack of a conference eliminated whatever light might have been shed by a conference report.

Nevertheless, this is a case of actions-speaking louder than words, and the events described above reflect a deliberate congressional intent to limit court of appeals jurisdiction over bankruptcy decisions. The interplay between the House and Senate was conscious and informed as each responded to changes proposed by the other. The original bill passed by the House gave to the courts of appeals direct appellate jurisdiction over bankruptcy courts by appropriate amendments to Sections 1291 and 1292. When the Senate chose to continue appellate jurisdiction in district courts, the House acceded by deleting the proposed amendments to Sections 1291 and 1292 and substituting provisions for appellate review by district courts of final bankruptcy court decisions and of interlocutory bankruptcy court decisions upon leave of the district court. The House did not include in this amended version any explicit provision for court of appeals review of either final or interlocutory decisions of district courts reviewing decisions of bankruptcy courts. Although final decisions might be reviewable under Section 1291, review of interlocutory decisions would have been severely limited because such review would appear to have been limited to cases in which the district court had already granted leave. In those circumstances, the Senate's subsequent addition of the substance of Section 158(d) providing for court of appeals review of final

decisions of district courts reviewing bankruptcy decisions strongly indicates that court of appeals jurisdiction was intended to be limited to review of such final decisions.

The creation of the withdrawal procedure in 1984, however, created an apparently unnoticed anomaly. If Section 158(d) precludes court of appeals review of interlocutory decisions of bankruptcy courts, including injunctions, Supreme Court review also will be barred. In such circumstances, interlocutory bankruptcy decisions by district courts, including injunctions, acting in their original jurisdiction after a withdrawal of referral under Section 157(d), would be subject to review by a court of appeals and by the Supreme Court. However, an interlocutory decision by a bankruptcy court, involving the identical legal issue, would be subject only to discretionary review by district courts. No further review would be available. Court of appeals and Supreme Court jurisdiction would thus depend entirely on whether the district court had maneuvered the appeal into the proper procedural posture. A district court desiring to make appellate review available under Section 1292 could withdraw the bankruptcy court's reference and reaffirm that court's interlocutory order. A district court wishing to avoid such review could do so by not withdrawing reference to the bankruptcy court.

We are unpersuaded, however, that this anomaly is cause to treat Section 158(d) as superfluous and to ignore its history. First, the history detailed above indicates that in 1978 Congress intended to eliminate court of appeals jurisdiction over interlocutory orders of bankruptcy courts. The oversight, if any, occurred in 1984 when the withdrawal procedure was introduced, subjecting interlocutory decisions of district courts in withdrawn cases to review under Section 1292.

Second, the anomaly is not fatally serious. Even if review of an interlocutory district court decision in a non-withdrawn case was available under Section 1292(b), that review could be avoided by a district court's declining to grant leave under Section 158(a). Moreover, whether Section 1292 can be

stretched to include review of interlocutory decisions of bankruptcy panels seems at least in doubt. Finally, there is rough, if not complete, symmetry in limiting interlocutory appeals to: (i) discretionary review by the district court under Section 158(a) in non-withdrawn cases, and (ii) court of appeals review of interlocutory decisions in withdrawn cases under Section 1292.

The Third Circuit has strongly argued against giving force to the negative implication of Section 158(d) and stated in *Coastal Steel Corp. v. Tilghman Wheelabrator Ltd.*, 709 F.2d 190, 200 n.7 (3d Cir.), *cert. denied*, 464 U.S. 938 (1983):

> Given the enormity of the change in law which would bar all court of appeals and Supreme Court review of interlocutory orders in bankruptcy cases, and the complete absence of discussion of such a change [in the legislative record], we are not ready to assume without critical analysis that those courts which have held such review to be barred are correct.

Thus, if Section 158(d) precludes interlocutory review under Section 1292, "the bankruptcy courts have been given pendente lite powers, subject only to district court review, equivalent to those exercised by the federal circuit courts prior to the passage of the Evarts Act in 1891." *Coastal Steel*, 709 F.2d at 199.

We by no means suggest that these arguments lack force as policy statements. Indeed, it might also be argued that the result we reach is not consistent with the canon of construction disfavoring repeals by implication. Such an argument, however, ignores the fact that Section 1292 is clearly "repealed" with regard to all interlocutory decisions of bankruptcy courts except for those for which leave to appeal is granted by a district court under Section 158(a). The "repeal" we infer from Section 158(d) is thus part of a far greater explicit repeal. The canon disfavoring interpretations that render statutory language superfluous – as would be the fate of Section 158(d) were we to adopt a different result – would thus seem to prevail. Canons aside, we have concluded that Congress made a deliberate and informed policy decision that is binding upon us. This conclusion is in accord with the weight of opinion in other circuits. *See Capitol Credit Plan of Tenn., Inc. v. Shaffer*, 912 F.2d 749, 754 (4th Cir. 1990) (§ 1292(b) inapplicable); *In re Atencio*, 913 F.2d 814, 816 (10th Cir. 1990) (§ 1292(a) inapplicable); *In re Kaiser Steel Corp. (Kaiser Steel Corp. v. Frates)*, 911 F.2d 380, 386 (10th Cir. 1990) (§ 1292(b)); *In re Hester (Hester v. NCNB Tex. Nat'l Bank)*, 899 F.2d 361, 365 (5th Cir. 1990) (§ 1292(a)); *In re First South Sav. Ass'n*, 820 F.2d 700, 708-09 (5th Cir. 1987) (§ 1292(a)); *In re Teleport Oil Co. (Teleport Oil Co. v. Security Pac. Nat'l Bank)*, 759 F.2d 1376 (9th Cir. 1985) (§ 1292(a)). *But see In re Jartran, Inc.*, 886 F.2d 859, 865 (7th Cir. 1989) (§ 1292(b)).

Dismissed.

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 15th day of February, one thousand nine hundred and ninety-one.

Present: HON. RALPH K. WINTER
HON. J. DANIEL MAHONEY
HON. JOHN M. WALKER, JR.

Circuit Judges,

THOMAS M. GERMAIN, TRUSTEE FOR THE ESTATE OF O'SULLIVAN'S FUEL OIL CO., INC.,

Plaintiff-Respondent,

-v- Docket No. 90-8054

THE CONNECTICUT NATIONAL BANK,

Defendant-Petitioner.

A petition for leave to appeal from a district court order affirming an interlocutory order of the bankruptcy court having been filed.

ON CONSIDERATION THEREOF, it is

ORDERED that the petition be and it hereby is dismissed for lack of jurisdiction in accordance to the opinion of this court.

Elaine B. Goldsmith, Clerk
By:
/s/ Edward J. Guardaro
Edward J. Guardaro,
Deputy Clerk

STATUTES

11 U.S.C. § 47(a) (repealed 1978)

§ 47. Jurisdiction of Appellate Courts. a. The United States court of appeals, in vacation, in chambers, and during their respective terms, as now or as they may be hereafter held, are hereby invested with appellate jurisdiction from the several courts of bankruptcy in their respective jurisdictions in proceedings in bankruptcy, either interlocutory or final, and in controversies arising in proceedings in bankruptcy, to review, affirm, revise, or reverse, both in matters of law and in matters of fact: *Provided, however,* That the jurisdiction upon appeal from a judgment on a verdict rendered by a jury shall extend to matters of law only: *And provided further,* That when any order, decree, or judgment involves less than $500, an appeal therefrom may be taken only upon allowance of the appellate court.

b. Such appellate jurisdiction shall be exercised by appeal and in the form and manner of an appeal.

c. The Supreme Court of the United States is hereby vested with jurisdiction to review judgments, decrees, and orders of the United States courts of appeals in proceedings under this Act in accordance with the provisions of the laws of the United States now in force or such as may hereafter be enacted.

11 U.S.C. § 305 (1990)

§ 305. Abstention

(a) The court, after notice and a hearing, may dismiss a case under this title, or may suspend all proceedings in a case under this title, at any time if –

(1) the interests of creditors and the debtor would be better served by such dismissal or suspension; or

(2)(A) there is pending a foreign proceeding; and

(B) the factors specified in section 304(c) of this title warrant such dismissal or suspension.

(b) A foreign representative may seek dismissal or suspension under subsection (a) (2) of this section.

(c) An order under subsection (a) of this section dismissing a case or suspending all proceedings in a case, or a decision not so to dismiss or suspend, is not reviewable by appeal or otherwise by the court of appeals under section 158(d), 1291, or 1292 of this title [sic] or by the Supreme Court of the United States under section 1254 of this title [sic].

28 U.S.C. § 151 (1984)

§ 151. Designation of bankruptcy courts

In each judicial district, the bankruptcy judges in regular active service shall constitute a unit of the district court to be known as the bankruptcy court for that district. Each bankruptcy judge, as a judicial officer of the district court, may exercise the authority conferred under this chapter with respect to any action, suit, or proceeding and may preside alone and hold a regular or special session of the court, except as otherwise provided by law or by rule or order of the district court.

28 U.S.C. § 157 (1986)

§ 157. Procedures

(a) Each district court may provide that any or all cases under title 11 and any or all proceedings arising under title 11 or arising in or related to a case under title 11 shall be referred to the bankruptcy judges for the district.

(b)(1) Bankruptcy judges may hear and determine all cases under title 11 and all core proceedings arising under title 11, or arising in a case under title 11, referred under subsection (a) of this section, and may enter appropriate orders and judgments, subject to review under section 158 of this title.

(2) Core proceedings include, but are not limited to –

(A) matters concerning the administration of the estate;

(B) allowance or disallowance of claims against the estate or exemptions from property of the estate, and estimation of claims or interests for the purposes of confirming a plan under chapter 11, 12, or 13 of title 11 but not the liquidation or estimation of contingent or unliquidated personal injury tort or wrongful death claims against the estate for purposes of distribution in a case under title 11;

(C) counterclaims by the estate against persons filing claims against the estate;

(D) orders in respect to obtaining credit;

(E) orders to turn over property of the estate;

(F) proceedings to determine, avoid, or recover preferences;

(G) motions to terminate, annul, or modify the automatic stay;

(H) proceedings to determine, avoid, or recover fraudulent conveyances;

(I) determinations as to the dischargeability of particular debts;

(J) objections to discharges;

(K) determinations of the validity, extent, or priority of liens;

(L) confirmations of plans;

(M) orders approving the use or lease of property, including the use of cash collateral;

(N) orders approving the sale of property other than property resulting from claims brought by the estate against persons who have not filed claims against the estate; and

(O) other proceedings affecting the liquidation of the assets of the estate or the adjustment of the debtor-creditor or the equity security holder relationship, except personal injury tort or wrongful death claims.

(3) The bankruptcy judge shall determine, on the judge's own motion or on timely motion of a party, whether a proceeding is a core proceeding under this subsection or is a proceeding that is otherwise related to a case under title 11. A determination that a proceeding is not a core proceeding shall not be made solely on the basis that its resolution may be affected by State law.

(4) Non-core proceedings under section 157(b)(2)(B) of title 28, United States Code, shall not be subject to the mandatory abstention provisions of section 1334(c)(2).

(5) The district court shall order that personal injury tort and wrongful death claims shall be tried in the district court

in which the bankruptcy case is pending, or in the district court in the district in which the claim arose, as determined by the district court in which the bankruptcy case is pending.

(c)(1) A bankruptcy judge may hear a proceeding that is not a core proceeding but that is otherwise related to a case under title 11. In such proceeding, the bankruptcy judge shall submit proposed findings of fact and conclusions of law to the district court, and any final order or judgment shall be entered by the district judge after considering the bankruptcy judge's proposed findings and conclusions and after reviewing de novo those matters to which any party has timely and specifically objected.

(2) Notwithstanding the provisions of paragraph (1) of this subsection, the district court, with the consent of all the parties to the proceeding, may refer a proceeding related to a case under title 11 to a bankruptcy judge to hear and determine and to enter appropriate orders and judgments, subject to review under section 158 of this title.

(d) The district court may withdraw, in whole or in part, any case or proceeding referred under this section, on its own motion or on timely motion of any party, for cause shown. The district court shall, on timely motion of a party, so withdraw a proceeding if the court determines that resolution of the proceeding requires consideration of both title 11 and other laws of the United States regulating organizations or activities affecting interstate commerce.

28 U.S.C. § 1293 (repealed 1984)

§ 1293. Bankruptcy appeals

(a) The courts of appeals shall have jurisdiction of appeals from all final decisions of panels designated under section 160(a) of this title.

(b) Notwithstanding section 1482 of this title, a court of appeals shall have jurisdiction of an appeal from a final judg-

ment, order, or decree of an appellate panel created under section 160 or a District court of the United States or from a final judgment, order, or decree of a bankruptcy court of the United States if the parties to such appeal agree to a direct appeal to the court of appeals.

28 U.S.C. § 1334 (1990)

§ 1334. Bankruptcy cases and proceedings

(a) Except as provided in subsection (b) of this section, the district court shall have original and exclusive jurisdiction of all cases under title 11.

(b) Notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11.

(c)(1) Nothing in this section prevents a district court in the interest of justice, or in the interest of comity with State courts or respect for State law, from abstaining from hearing a particular proceeding arising under title 11 or arising in or related to a case under title 11.

(2) Upon timely motion of a party in a proceeding based upon a State law claim or State law cause of action, related to a case under title 11 but not arising under title 11 or arising in a case under title 11, with respect to which an action could not have been commenced in a court of the United States absent jurisdiction under this section, the district court shall abstain from hearing such proceeding if an action is commenced, and can be timely adjudicated, in a State forum of appropriate jurisdiction. Any decision to abstain or not abstain made under this subsection is not reviewable by appeal or otherwise by the court of appeals under section 158(d), 1291, or 1292 of this title or by the Supreme Court of the United

States under section 1254 of this title. This subsection shall not be construed to limit the applicability of the stay provided for by section 362 of title 11, United States Code, as such section applies to an action affecting the property of the estate in bankruptcy.

(d) The district court in which a case under title 11 is commenced or is pending shall have exclusive jurisdiction of all of the property, wherever located, of the debtor as of the commencement of such case, and of property of the estate.

28 U.S.C. § 1651 (1949)

§ 1651. Writs

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

(b) An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction.

29 U.S.C. § 110 (1984)

§ 110. Review by Court of Appeals of issuance or denial of temporary injunctions; record

Whenever any court of the United States shall issue or deny any temporary injunction in a case involving or growing out of a labor dispute, the court shall, upon the request of any party to the proceedings and on his filing the usual bond for costs, forthwith certify as in ordinary cases the record of the case to the court of appeals for its review. Upon the filing of such record in the court of appeals, the appeal shall be heard and the temporary injunctive order affirmed, modified, or set aside expeditiously.